In regard to the security arrangement Mr. Yap Sen Fook a police officer (DW2) expresed the view that policing at the port area was adequate. Nevertheless it seems clear that further measures could be taken to tighten up the security in particular the checking of goods leaving the port area, supervision of personnel having the charge of checking and delivery arrangement.

Mr. Puthucheary, in his submission touching upon the evidence adduced by the plaintiffs to the effect that 93 cases were discharged by the ship and that Mr. Ng Boon Bee and a revenue officer counted 93 cases in Shed No. 8, said that the Port Authorities have not sought to contradict this evidence because they had no means of knowing and therefore do not know whether the cases alleged to be missing were in fact under the custody of the Port Authorities.

In the present case I am satisfied that in the light of all the surrounding circumstances, the Port Authorities are liable for breach of their duty as bailees for reward. The plaintiffs' claim must therefore succeed.

I allow the plaintiffs' claim in the sum of $21,236.84 being value of the 64 cases undelivered and interest at 3% per annum with effect from April 3, 1970 and costs. Costs of the first defendant shall be paid by the second defendant.

Claim allowed.

Solicitors: *Shearn, Delamore & Co.; Lovelace & Hastings; Skrine & Co.*

WONG KIM FATT v. LEONG & CO. SDN. BHD. & ANOR.

[O.C.J. (Abdul Razak J.) June 29, 1974]
[Kuala Lumpur — Civil Suit No. 652 of 1974]

Companies — Action for declaration that defendants not entitled to enforce provisions of an article in Articles of Association to transfer plaintiff's shares to second defendant — Application for injunction to restrain defendants until trial of the action from enforcing the provisions — Whether substantial questions to be investigated — Whether company in substance a partnership — Whether plaintiff would suffer irreparable damage if remedy not granted.

The parties were originally partners carrying on business until they decided to form themselves into a company. The company was a private unlimited company having a share capital. The plantiff held $50,000 of the shares and the second defendant $250,000. They were the only shareholders and directors. The company had served a notice asking the plaintiff to transfer all his shares to the defendant under the provisions of article 21(d) of the Articles of Association. The plaintiff did not comply with the notice but instead brought an action (a) for a declaration that the defendants were not entitled or empowered in law or in equity to enforce the provisions of Article 21(d) of the Articles of Association to transfer the plaintiff's shares to the second defendant (b) for a declaration that the said company was in effect a partnership and the defendants were not entitled in law or equity to make the said requisition. He subsequently applied by motion for an injunction to restrain the defendants until trial of the action from enforcing the provisions of the article.

Held: the interim injunction would be granted as it is only doing substantial justice to the case and for the purpose of safely preserving the subject-matter of the action until the rights of the parties are finally determined that the defendants be restrained from exercising their rights under article 21(d) of the Articles of Association.

Cases referred to:-

(1) *Sparrow* v. *The Oxford, Worcester and Wolverhampton Railway Company* 68 E.R. 580 at p. 582.
(2) *Jones* v. *Pacaya Rubber and Produce Company Ltd.* [1911] 1 K.B. 455.
(3) *Republic of Peru* v. *Dreyfons Brothers & Co.* (1988) 38 Ch. D. 348 at p. 362.
(4) *The Eastern Trust Company* v. *McKenzie, Mann & Co. Ltd.* [1915] A.C. 750 at p. 760.
(5) *Ebrahimi* v. *Westbourne Galleries Ltd. & Ors.* [1972] 2 All E.R. 492.
(6) *Blisset* v. *Daniel* 68 E.R. 1022.

CIVIL SUIT.

Lim Ewe Hock for the plaintiff.

Peter Mooney for the second defendant.

Abdul Razak J.: This is a motion for an injunction to restrain the defendants until the trial of the Action No. 604/74 from enforcing the provisions of article 21(d) of the Articles of Association of the plaintiff's and the defendant's company, which reads as follows: —

"21(d) The holders for the time being of seven-tenth of the issued capital of the company may at any time serve the company with a requisition to enforce the transfer of any particular shares not held by the requisitionists. The company shall forthwith give to each registered holder of such shares notice in writing of the requisition (with a copy of this clause and of article 21(e) sub-joined) and unless within fourteen (14) days such holder shall have entered into an agreement in writing with the requisitioning members for the sale to them of his shares, he shall at the expiration of the said period be deemed to have sold and the requisitioning members shall be deemed to have purchased his said shares at a price or value to be determined in accordance with these articles."

Sub-section (e) stipulates the manner in which the price or value of the shares shall be determined, which provides in effect that the value shall be calculated by dividing the average yearly profit of the last three years (after the necessary deductions therein stated) by the amount of the issued capital existing at the end of the last of the three years before the sale or transfer.

One will at once notice that the said Article gives a member affected no reason for the take-over nor the opportunity to be heard. As far as the company is concerned, it is not obliged to do so. The directors could behind the back of the others by this method expel a member for any reason.

In the civil action, the plaintiff has asked the court for a declaration that the defendants are not entitled or empowered in law or equity to enforce the provisions of article 21(d) to transfer the plaintiff's shares to the second defendant. Further he asks for a declaration that the said company is in effect a partnership and the defendants are not entitled in law or equity to make the said requisition. He states the said requisition is null and void and asks for an injunction to restrain the enforcement.

The parties were originally partners carrying on business as such until they decided to form themselves into a company. They had been in business for more than five years until one day when the company served a notice under article 21(d) to compel the applicant/plaintiff to transfer all his shares to the defendant. No

reason was given for the move. The plaintiff did not comply with the notice. Instead he brought the above action to dispute the compulsory transfer.

The company is a private unlimited company having a share capital. The plaintiff holds $50,000 of the shares and the defendant $250,000. They are the only shareholders and directors. They are the subscribers to the Memorandum and Articles of the Company and are the signatories to the Articles and Memorandum.

Are the circumstances therefore such as to give rise to an interim injunction against the defendant? The plaintiff's counsel says that it is. The defendant's counsel says that it is not. The plaintiff's counsel says that he has a good cause of action; that article 21(d) must be construed to mean that there has to be at least two shareholders in the company and the action of the defendant would nullify all that. He further says that the relationship between the plaintiff and the defendant is in substance a partnership and therefore it could not be within the contemplation of the parties that the partnership should end this way. The plaintiff in his affidavit further says that he would suffer irreparable damage if the relief is not granted because he would be deprived of continuing and future profits which are difficult to estimate, and damages would not compensate for the loss of his rights if he succeeds. He asks for summary interference of the court to prevent the exercise of an alleged legal right upon the ground that the right either does not exist or is doubtful. The plaintiff's counsel refers to the case of *Sparrow* v. *The Oxford, Worcester and Wolverhampton Railway Company,*[1] for the court to intervene in this manner. He also says that the injunction is necessary to put matters at a *status quo* until the trial, and refers to the case of *Jones* v. *Pacaya Rubber and Produce Company, Limited,*[2] (a case for forfeiture of shares for non-payment of the balance due on the shares). He maintains that the duty of the court is merely to consider whether there is a probable case for relief at the hearing, and refers to the case of *Republic of Peru* v. *Dreyfus Brothers & Co.,*[3] citing the judgment of Kay J. at page 362. He states the relief is necessary for the safe preservation of the subject-matter of the action until the rights of the parties can be finally determined, citing the judgment of Sir George Farwell in *The Eastern Trust Company* v. *McKenzie, Mann & Co., Limited.*[4] The plaintiff, he says, further is prepared to give an undertaking in damages. The plaintiff's counsel argues that even if the defendant has the legal right under article 21(d), he should nevertheless not be allowed in equity to exercise the right because the company is in substance a partnership and what is intended to be done cannot conceivably be within the contemplation of the parties when the company was formed, referring to the case of *Ebrahimi* v. *Westbourne Galleries Ltd. & Ors.,*[5] where the House of Lords had exercised the discretion to wind up the company on the basis that it was just and equitable to do so since the parties being originally partners could not have contemplated that the relationship between them would result in one of the directors being expelled. The principle underlying the case is that the court recognises the fact that there might be circumstances in which the mutual rights of the members are not exhaustively defined in the articles. *e.g.* where they had entered into membership of the company on the basis of a personal relationship involving mutual confidence or understanding. It is noteworthy that in the *Ebrahimi* case the plaintiff had a choice whether he would continue to be in the company or not. It is also noted that in the *Ebrahimi* case, as in the present case, the parties were signatories to the Memorandum and Articles of Association. The court had nevertheless intervened to protect the interests of the plaintiff.

The defendant's counsel, on the other hand, argues that before there can be an injunction, the plaintiff must prove that he has a *prima facie* case. He must show that there is a definite right which must be protected. He urges that the plaintiff is a signatory to the Memorandum and Articles of Association of the company and therefore cannot be heard to say that they do not bind him. He contends that neither law nor equity should assist someone to break his own solemn covenant. He further contends that being incorporated as a private company, the partnership between the plaintiff and the defendant has ceased to exist and whatever rights there may exist can only be those that are contained in the articles. He urges that the plaintiff must show irreparable damage to him if the relief is denied. The plaintiff, he points out, is not claiming damages. Even if the plaintiff succeeds at the trial, he would not be prejudiced because any director appointed would be held null and void and the plaintiff would be restored with all the profits. If there is any dispute as to the right of third parties, then, he says, this is a matter strictly between the defendant and the third parties, and not the plaintiff. He argues that the case of *Ebrahimi* v. *Westbourne Galleries Ltd.* has no application to the present case because the remedy sought is different.

In my view, it is sufficient in order to seek an injunction to find whether the plaintiff has shown grounds for doubting the existence of the defendant's right — see *Sparrow* v. *The Oxford, Worcester and Wolverhampton Railway Company,* cited above at page 580. It is not necessary that the court should find the case which would entitle the plaintiff to relief at all events. It is quite sufficient if the court finds a *prima facie* case. It is sufficient if there is a substantial question to be investigated and that matters ought to be preserved in *status quo* until that question can be finally disposed of — see *Halsbury's Laws of England, Vol. 21, Third Edition* at page 365. One of the questions to be asked is whether, as the plaintiff contends, the company is in substance a partnership and therefore, whether the principle of *Ebrahimi* above cited is applicable. If so, then although the company may have the legal power to dismiss, it may be inequitable for it to do so. As Plowman J. said: [6]

> "... while no doubt the petitioner was lawfully removed, in the sense that he ceased in law to be a director, it does not follow that in removing him the respondents did not do him a wrong. In my judgment, they did do him a wrong, in the sense that it was an abuse of power and a breach of good faith which partners owe to each other to exclude one of them from all participation in the business on which they have embarked on the basis that all should participate in its management. The main justification put forward for removing him was that he was perpetually complaining, but the faults were not all on one side and, in my judgment, this is not sufficient justification. For these reasons, in my judgment,

the petitioner therefore has made out a case for a winding-up order."

No doubt the remedy sought here is different, but there is no reason why since a declaration coupled with an injunction are what the plaintiff is asking for, the principle governing the relief sought should not be the same. It would appear that the principle is applicable to the plaintiff and whether it is in fact so and whether the facts would ultimately bear it out must be left to the trial court to investigate and go into. It needs to be asked why that although the parties have been carrying on business as partners and the plaintiff has not shown to be at a disadvantage as such he would be willing to enter into a solemn covenant with the defendant to form into a company which has as one of its provisions the effect of expelling him as a director and as a shareholder with all the rights that go with it at the mere stroke of the defendant's pen and according to his whim and fancy. Again it needs to be asked why the plaintiff has chosen to abandon the partnership where he would at common law be protected by being given the right to be heard before he is expelled (see *Blisset* v. *Daniel*[6]) in favour of forming the company, which under our law does not give him that right even if it seems there is bad faith on the part of the person who exercises the right. Why has the plaintiff chosen to abdicate all his rights for the business which he has from the beginning helped to raise. These questions may need to be looked into at the trial since they would bear on the question of whether the company is still in substance a partnership as stated in *Ebrahimi* v. *Westbourne Galleries Ltd. & Ors.*

I do not doubt that if the plaintiff is not allowed this remedy he would suffer irreparable damage. In my view, if the relief is denied, the damage done will hardly be just a matter of revoking any appointment made and restoring the profits accrued. One needs only to examine the various powers and functions given and laid down in the articles to see the extent of the damage that may be incurred. The person appointed as a director and who becomes a member by virtue of the vacancy created under article 21(d) would, it is deemed, be carrying out various duties and functions in the natural course of his duty as a director. He may either alone, or in conjunction with the defendant or on behalf of the company or as a company (he and the defendant being the only shareholders) be transferring share or shares to a person who is not a member under article 21. He may increase or decrease the capital of the company under articles 40 and 44, borrow money under article 47, declare what is the nett profit of the company (whose decision is conclusive) under article 95. He may be doing all these and one or the other of his acts may land the company in loss to the detriment of the plaintiff, but whose concurrence or otherwise in the decision which brings it about is absolutely of no account. And there is apparently nothing plaintiff can do about it since under article 86 the purported director whose appointment may in fact be declared to be null and void later is in the same position as far as his acts are concerned as one who has lawfully and validly been appointed. Counsel for the defendant says that if a third party question arises, it is strictly a matter between the defendant and the third party. But in such an event, will not the writ be issued against the company? I should think so. And being against the company the plaintiff will perforce be called upon to discharge the burden thrust upon the company for which he had in the interim period no say in the running. The company may be so in debt that it may be necessary for reasons which the plaintiff had earlier not been responsible for, to wind it up after all. It seems certain also that not having been a director the plaintiff would also not be able to recover his arrears of remuneration as a director. In my view, it is only doing substantial justice to the case and for the purpose of safely preserving the subject-matter of the action until the rights of the parties are finally determined that defendant be restrained from exercising his rights under article 21(d). I grant the interim injunction therefore subject to an undertaking by the plaintiff as to damages with two sureties.

Costs will be in the cause.

Order accordingly.

Solicitors: *Lim Ewe Hock; Skrine & Co.*

MALAYAWATA STEEL BHD. v. GOVERNMENT OF MALAYSIA & ANOR.

[O.C.J. (Mohamad Azmi J.) July 13, 1974]
[Kuala Lumpur — Civil Suit No. 2263 of 1969]

Equity — Equitable assignment — Assignment of right to receive payment from defendant for steel supplied by plaintiffs to construction company — Assignment conditional, non-absolute and severable — Assignment enforceable only where defendant instructed by construction company to make payment direct to plaintiff — Assignment unenforceable in the absence of such instruction.

The plaintiffs claimed payment of the sum of $215,618.68 being the balance of payment due for the supply of steel to a construction company for the Radio House project of the Government. The claim was based on an equitable assignment alleged to have been made in favour of the plaintiffs with the construction company as assignor and the Government as the debtor. The Government had agreed to pay the cost of the steel supplied direct to the plaintiffs, if so directed from time to time by the construction company.

Held: (1) the equitable assignment in this case was conditional and non-absolute and also severable as it was enforceable only on an *ad hoc* basis when the Government was instructed by the construction company from time to time to make the payment direct to the plaintiffs;

(2) on the facts the equitable assignment was not enforceable and therefore the claim should be dismissed;

(3) as the plaintiffs had taken no action after they come to know that the Government had on two occasions made payment to the construction company instead of to themselves, there was an implied waiver and therefore it became inequitable for the court to enforce the equitable assignment, whatever may be the nature of such assignment;

(4) even if the plaintiffs had proved that the equitable assignment was enforceable, in that it was not conditional or not non-absolute or not severable, the claim would still fail in view of the unsatisfactory evidence as to the amount of steel supplied and its value.

Cases referred to:-

(1) *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* [1904-7] All E.R. Rep. 345.

(2) *Durham Brothers* v. *Robertson* [1898] 1 Q.B. 765 at p. 769.